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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 179 OF 1998

Dr. (Smt.) Annapurna Nayak .. Petitioner

V/s

1. Gyan Chand Varshey (Gupta)
2. State of Maharashtra .. Respondents

Mr.A.P. Mundargi i/b Mr.Ganesh Gole for the petitioner.

Mr.D.P. Adsule, A.P.P. for the State.

Mr.Amarendra Mishra h/f Miss S.D. Khot for respondent no.1.

CORAM : D.G. KARNIK, J.

DATE : 21ST NOVEMBER 2007

ORAL JUDGMENT:

1. By this revision application, the petitioner takes exception to the judgment and order dated 27th November 1997 passed by the learned Sessions Judge, Mumbai whereby he allowed Criminal Revision Application No.219 of 1996 and set aside the order of the Additional Chief Metropolitan Magistrate dismissing the complaint of the respondent no.1.

2. The respondent no.1 (hereinafter referred to as

"the complainant") filed a complaint bearing Case No.446/MISC/95 in the Court of Additional Chief Metropolitan Magistrate, 2nd Court, Mazgaon, Mumbai alleging that the petitioner and one nursing staff working under her were guilty under section 304 read with section 114 of the Indian Penal Code (for short "the I.P.C."). The allegation of the complainant is that his wife was suffering from cancer and was admitted to Jagjivan Ram Hospital, owned by the Western Railway. At the relevant time, the petitioner was working as a doctor in the Jagjivan Ram Hospital. The complainant's wife was referred to the Tata Memorial Hospital for a check up. Tata Memorial Hospital advised certain injections to be given to the wife of the complainant at intervals of one week. Contrary to the instructions of Tata Memorial Hospital, the petitioner and an unnamed nurse gave injections everyday instead of every week resulting in the death of the wife of the complainant. The complainant, therefore, alleged that the petitioner had committed an offence under section 304 read with section 144 of the I.P.C.

3. According to the complainant, he had gone to the police station for lodging a First Information Report, but as the police failed to take any action he moved the learned Additional Chief Metropolitan Magistrate with a private complaint. On perusal of the complaint, the

learned Additional Chief Metropolitan Magistrate was of the view that the issuance of process should be postponed and he may himself conduct an enquiry under section 202 of the Code of Criminal Procedure (for short "the Cr.P.C."). He required certain documents and papers for the enquiry. Accordingly, he issued a summons to the Jagjivan Ram Hospital for production of medical case papers of the wife of the complainant. Thereupon, the petitioner became aware of the proceedings filed against her. She thereafter made an application for quashing the proceedings on the ground that she was a public servant appointed by the President of India by a notification published in the Gazette of India dated 30th September 1978 at page 1329, Part 2 thereof. She further pleaded that sanction under section 197 of Cr.P.C. was necessary prior to the filing of the complaint and as the sanction was not obtained, the complaint was not maintainable. The learned Additional Chief Metropolitan Magistrate, who heard the application made by the complainant, came to the conclusion that the petitioner was a public servant to whom section 197 of Cr.P.C. was applicable and as the necessary sanction for the prosecution was not obtained the complaint was not maintainable. He therefore dismissed the complaint.

4. Aggrieved by the decision of the learned

Magistrate dismissing his complaint, the complainant filed a revision, bearing Criminal Revision Application No.219 of 1996, before the learned Sessions Judge. The learned Sessions Judge came to the conclusion that the petitioner, who was arrayed as an accused in the complaint, has no locus to appear before the Magistrate nor had any locus standi to make an application unless and until process was issued against her. He, therefore, came to the conclusion that the application made by the petitioner before the learned Magistrate for her discharge and/or dismissal of the complaint was not maintainable. He accordingly set aside the order passed by the learned Magistrate and directed him to proceed with the matter in accordance with law. He further directed the petitioner to appear before the Magistrate on 6th January 1998. That decision is impugned in this revision application.

5. In **Chandra Deo Singh v. Prakash Chandra Bose, reported in AIR 1963 SC 1430**, the Supreme Court has held that the object of section 202 of Cr.P.C. is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent the person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind that provision and it is to find out what material is there to support the allegations

made in the complaint. It is the boundant duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of material placed before the Magistrate by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under section 202 Cr.P.C. can in no sense be characterised as a trial. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in the enquiry under section 202 of Cr.P.C.

6. In **Smt.Nagawwa v. Veeranna Shivalilingappa Konjalgi, reported in AIR 1976 SC 1947**, the Supreme Court has held that at the stage of issuing of process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient ground for proceeding against the accused. The scope of the enquiry under section 202 of Cr.P.C. is extremely limited only to the ascertainment of the truth or falsehood of the

allegations made in the complaint - (i) on the material placed by the complainant before the Court, (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out, and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have in fact. In proceedings under section 202, the accused has absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.

7. The aforesaid two decisions of the Supreme Court make it clear that in an enquiry under section 202 of Cr.P.C., the accused has no right to be heard. In fact, he has no locus to address the court on the question whether the process should be issued against him or not. He may remain present in person or through an advocate with a view to be informed as to what is going on, but has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so.

8. In view of this clear position, the learned Magistrate was not entitled to permit the petitioner to take part in the proceedings much less make an application for her discharge and/or dismissal of the complaint at the threshold. I, therefore, find no error

in the decision of the learned Sessions Judge in holding that the petitioner had no right to move the learned Magistrate for her discharge and/or dismissal of the complaint. In my view, the application for discharge and/or dismissal of the complaint made by the petitioner was premature. No process was issued against the petitioner. The learned Magistrate had not made up his mind whether the case was worth issuing process. The inquiry, which the learned Magistrate was conducting under section 202 of Cr.P.C., was only for the purpose of finding out whether the process should be issued or not. Until the process was issued, the petitioner had no right to take part in the proceedings. The learned Magistrate was clearly in error in permitting the petitioner to take part in the proceedings and to apply for her discharge and/or dismissal of the complaint. The order of the learned Sessions Judge cannot therefore be faulted.

9. Mr.Mundargi, learned Senior Advocate appearing for the petitioner, submitted that the learned Magistrate has held that the complaint was not maintainable without the sanction under section 197 of Cr.P.C. but since the order has been set aside by the learned Sessions Judge, the learned Magistrate is likely to misconstrue the order of the Sessions Court and hold that the contention of the petitioner that the complaint

without sanction under section 197 of Cr.P.C. is not maintainable is foreclosed forever. In my view, the apprehension is fallacious. The learned Sessions Judge has not allowed the revision on the ground that sanction under section 197 of Cr.P.C. was not required. He has merely set aside the order on the ground that the petitioner had no locus to make an application for discharge and/or dismissal or the complaint until a process was issued against her. The contention whether the sanction under section 197 of Cr.P.C. is necessary for taking cognisance of the complaint or not is a question which can be raised by the petitioner at any stage after the Magistrate, if at all, issues process against the petitioner.

10. In **Raj Kishor Roy v. Kamleshwar Pandey, reported in (2002) 6 SCC 543**, the Supreme Court has held that the question of sanction can be raised at any time after the cognizance of the offence is taken, even at the time of conclusion of the trial. It is thus clear that the applicant is entitled to raise question of requirement of obtaining of the sanction under section 197 of the Cr.P.C. after the process is issued at any stage of the trial. It would also be open to the Magistrate at the stage of an enquiry under section 202 of the Cr.P.C. suo motu, look into the question prima facie whether the sanction is necessary or not before he

decides to issue process.

11. With this clarification, revision application is dismissed. Rule is discharged.

(D.G. KARNIK, J.)